Sequel of New Mexico LLC, d/b/a Bernalillo Academy *and* Andrea E. Baumgartner and District 1199NM, National Union of Hospital and Healthcare Employees AFSCME, AFL-CIO. Case 28–RD–093404

December 15, 2014

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND JOHNSON

The National Labor Relations Board, by a three-member panel, has considered objections to an election held December 21 and 22, 2012, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 18 for and 21 against the Union, with no challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings and recommendations only to the extent consistent with this Decision, and finds that a certification of results of election should be issued.

The hearing officer recommended sustaining the Union's Objection 1, which alleges that the Employer engaged in objectionable conduct by holding a holiday party for employees on the first day of the election without a past practice of holding such parties.[1] For the reasons that follow, we reject the hearing officer's recommendation.

On November 16, 2012,[2] employee-Petitioner Andrea Baumgartner delivered a decertification petition to the Board, which was filed and served on the parties on November 19. Also on November 19, the Employer's "employee retention committee" (consisting of four managers and two employees) issued a flyer that announced a staff holiday party to be held on December 21.[3] The flyer described the party as a "staff dinner" for employees and their guests, to be held on December 21 from 6 to 9 p.m., and the invitees included nonunit as well as unit employees. On November 26, the Regional Director approved a Stipulated Election Agreement scheduling the election for December 21 and 22. On December 21, approximately 65 people attended the party, which was held at a barbeque restaurant and featured appetizers, drinks, and a buffet. Employees were not paid for attending, and the election was not discussed. The Employer provided food and smoothies at its facility for employees who were required to work during the party.

During the critical preelection period, the Employer offered employees food at other times in addition to the holiday party, providing smoothies on at least one other occasion. Also, about 2 weeks before the election, the Employer started allowing employees to eat lunches provided for the students at the Bernalillo Academy (the Academy). No evidence was introduced regarding whether, how often, or how many employees ate the lunches. One week before the election, the Employer held a voluntary meeting at the facility during work hours at which it served breakfast burritos and beverages.[4] Since it began managing the Academy in March 2011, the Employer had not previously hosted a party or offered free food or drink. The Union did not allege these other "free food" events as objectionable.

The hearing officer noted that the Employer announced its holiday party on the same day the petition was filed, held the party on the first day of the election, and had no prior history of hosting parties. Citing these facts and the closeness of the election, the hearing officer found that employees would reasonably view the holiday party and additional instances of free food described above as a "series" of "first-time benefits" provided to dissuade employees from supporting the Union. She recommended that the results of the election be set aside. We disagree.

The Board's principles in this area are longstanding and have been equitably applied to employers and unions alike: "[C]ampaign parties, absent special circumstances, are legitimate campaign devices." *L. M. Berry & Co.*, 266 NLRB 47, 51 (1983) (citing *Fashion Fair, Inc.*, 157 NLRB 1645, 1646 fn. 3 (1966), enfd. in relevant part 399 F.2d 764 (6th Cir. 1968)) (employer's Christmas party—

[1] In the absence of exceptions, we adopt pro forma the hearing officer's recommendations that Objections 2, 3, and 4 be overruled.

[2] All dates hereafter are in 2012.

[3] The flyers did not refer to the decertification election, and the December 21 and 22 election dates had not been set at the time the party was announced. To the contrary, as noted in the text, the Stipulated Election Agreement was not approved by the Regional Director until November 26.

[4] The hearing officer found that, at this meeting, managers "asked employees how they could make things better." In its brief in response to the Employer's exceptions, the Union claims that the Employer thereby engaged in an objectionable solicitation of grievances. The Union did not, however, file any objection alleging a solicitation of grievances. Assuming without deciding that the Union could have raised its solicitation-of-grievances claim by way of exceptions to the hearing officer's report, it did not do that, either. Accordingly, the Union's claim is not properly before us. The Union also contends that certain managers' comments place the holiday party "in context"; but again, it filed no exceptions and thus did not except to the fact that the hearing officer did not link the managers' comments to the party. Accordingly, this contention is also not before us.

at which the union was not mentioned—8 days before election was lawful). Thus, the Board "will not set aside an election simply because the union or employer provided free food and drink to the employees." *Chicagoland Television News, Inc.*, 328 NLRB 367, 367 (1999).[5] However, the Board will examine whether particular events constitute or involve benefits sufficiently large to interfere with laboratory conditions for a fair election, which can result in setting aside the election. See *Chicago Tribune,* 326 NLRB 1057 (1998).

In determining whether the objecting party has established special circumstances, the Board examines several factors, including (1) the size of the benefit conferred in relation to the stated purpose for granting it; (2) the number of employees receiving it; (3) how employees reasonably would view the purpose of the benefit; and (4) the timing of the benefit. *Chicagoland Television News,* supra at 367 (citing *B & D Plastics*, 302 NLRB 245, 245 (1991)). As the objecting party, the Union has the burden to show by specific evidence that there has been prejudice to the election. *Affiliated Computer Services*, 355 NLRB 899, 900 (2010).

After carefully considering all relevant factors, we find that the Union has not met its burden on the specific facts of this case. First, the Union failed to present any evidence regarding the size of the benefit—i.e., the cost of the food and drinks provided by the Employer—in relation to its stated purpose. Absent such evidence, there is no basis to find this holiday party, even considered with the other instances of free food and drinks provided by the Employer, is like the lavish brunch found objectionable in *Chicago Tribune,* 326 NLRB at 1057.[6] Rather, the party appears to have been more like the event found unobjectionable in *Chicagoland Television News*, supra, 328 NLRB at 367. The Union has failed to meet its burden of providing specific evidence relative to the first *B & D Plastics* factor.[7]

Moreover, the evidence in this case does not establish anything about the arrangements for the party or the conduct at the party that amounts to "special circumstances." All employees, unit and nonunit, were invited to attend the holiday party. Attendance was voluntary, and employees were not paid for the time spent at the party. See *Chicagoland Television News*, supra (party unobjectionable where nonunit employees were also invited to attend, attendance was voluntary, and employees were not paid for attending); compare *River Parish Maintenance, Inc.,* 325 NLRB 815, 815 (1998) (paying employees extra hour's pay to attend offsite "crab boil" found objectionable). Nor was there mention of the Union or the election at the holiday party. See *Fashion Fair, Inc.*, 157 NLRB at 1646 fn. 3 ("Respondents' preelection party, at which no mention was even made of the Union, clearly did not violate the Act."); *Chicagoland Television News*, supra (party unobjectionable where invitation promised "No electioneering! Just food, drink, and good company!" and there were no campaign speeches). Finally, we accord little weight to the fact that this was the first such event any witness could recall because the Employer only assumed management of the facility 21 months before the election.

As for the timing of the party, there is no evidence that the election date had been set at the time the party was announced. We recognize that the holiday party was held in close proximity to the election, and that some of the other instances of free food and drink during the critical period may not have been provided if there were no election. But where free food and drink is otherwise unobjectionable, proximity to the election is insufficient to create special circumstances warranting a new election. See *Chicagoland Television News*, supra (party held day before election unobjectionable); see also *Peachtree City Warehouse, Inc.,* 158 NLRB 1031, 1035–1036, 1039–1040 (1966) (employer-sponsored dinner with music, dancing, and liquor shortly before election unobjectionable); *Lach-Simkins Dental Laboratories,* 186 NLRB 671, 671–672 (1970) (union-sponsored free luncheon at the time and near the place of polling unobjectionable); *Lloyd A. Fry Roofing Co.,* supra (union party, day before election).[8]

[5] See also *Lamar Advertising of Janesville,* 340 NLRB 979, 980 (2003); *E-Z Recycling*, 331 NLRB 950, 952 (2000); *Jacqueline Cochran, Inc.,* 177 NLRB 837, 839 (1969); *Lloyd A. Fry Roofing Co.,* 123 NLRB 86, 87–88 (1959).

[6] See also *Gould, Inc.*, 260 NLRB 54 (1982) (combination Christmas party and open house found objectionable where, among other actions, employer distributed more than $2000 in gifts to children of employees).

[7] Accordingly, we need not decide whether other instances of free food and drink not alleged as objectionable were sufficiently related to the Union's objection concerning the holiday party to warrant consideration. See *Precision Products Group,* 319 NLRB 640, 641 fn. 3 (1995), and cases cited therein.

[8] In upholding Objection 1, the hearing officer cited *Notre Dame Hills Medical Services,* 247 NLRB 957 (1980), and *Lou Taylor, Inc.,* 226 NLRB 1024 (1976), enfd. per curiam in relevant part 564 F.2d 1173 (5th Cir. 1977). Those cases are distinguishable.

In *Notre Dame,* the employer had announced that employees would have to pay to attend its holiday party. Two days after the representation petition was served on the employer, the employer posted a notice stating that the party would be free and, soon thereafter, announced a wage increase and gave each employee $10 cash. 247 NLRB at 959. The Board adopted the judge's findings that the employer's conduct improperly dissuaded employees from supporting the union in violation of Sec. 8(a)(1). Here, by contrast, the party was always free, and there were no allegations of any objectionable announcements, or grants of wage increases, or bonuses.

Under the circumstances of this case, we find that the party did not constitute objectionable conduct that warrants setting aside the election. Accordingly, for the reasons stated above, we overrule Objection 1 and certify the results of the election.

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for District 1199NM, National Union of Hospital and Healthcare Employees AFSCME, AFL–CIO, and that it is not the exclusive representative of these bargaining-unit employees.

Dated, Washington, D.C. December 15, 2014

Mark Gaston Pearce, Chairman

Philip A. Miscimarra, Member

Harry I. Johnson, III, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

In *Lou Taylor,* the day before the election the employer promised there would be a Christmas party 1 week after the election and that employees (i) would work until noon the day of the party but be paid for the full day, and (ii) would receive a paid holiday the following day. 226 NLRB at 1029. The Board adopted the judge's finding that the employer unlawfully promised and then granted "its employees a half day's paid holiday while they attended the Christmas party." Id. Here, by contrast, employees were not paid for attending the party as a new holiday benefit.